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NO. 072291

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

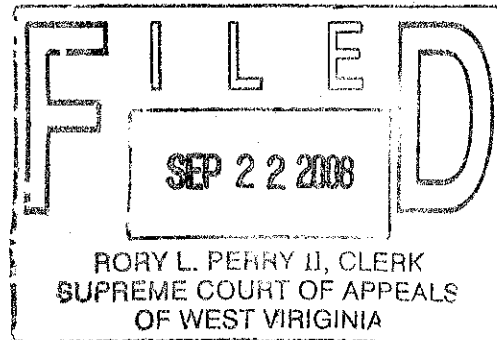
STATE OF WEST VIRGINIA,

*Plaintiff below — Appellee,*

v.

EARL MONTY RUTHERFORD,

*Defendant below — Appellant.*



**REPLY BRIEF OF THE APPELLANT**

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## II.

### APPELLANT'S REPLY ARGUMENT

The Appellee's argument with respect to West Virginia Code § 60A-4-408 is that the statute is essentially a sentence enhancement rather than an actual recidivist statute. The Appellant offers the following arguments to rebut the points made in the Appellee's brief:

#### A. Notice

At a minimum, a recidivist hearing requires that an information alleging prior convictions be filed prior to the imposition of an enhanced sentence. Before a recidivist sentence can be imposed pursuant to W. Va. Code § 61-11-19, a defendant would be formally charged in writing as a recidivist offender and receive notice of the alleged prior convictions. Like any typical criminal accusation, the burden of proof rests squarely with the State. In addition, the defendant would receive warnings concerning any admission that he is the same person named in the recidivist information. This last provision was conspicuously absent at the Appellant's sentencing hearing. See Sentencing Transcript, pp. 3-4.

#### B. Jury Trial on the Prior Convictions

The Appellee is correct that § 60A-4-408 is absolutely consistent with the Apprendi v. New Jersey, 530 U.S. 466 (2000). Apprendi promulgated a bright-line rule that, except for prior convictions, all factors that serve to increase a sentence beyond the statutory maximum must be found by a jury beyond a reasonable doubt. However, for the following reasons below, the Apprendi prior conviction exception is not consistent with the due process guarantees of the West Virginia Constitution, Art. III, § 10.

Apprendi preserved the prior conviction exception that was laid down in Almendarez-Torres vs. United States, 523 U.S. 224 (1998). The rationale given in Almendarez-Torres for this recidivism

exception was twofold. First, prior convictions are not elements of criminal offenses. Second, requiring prosecutors to include evidence of prior convictions at trial would unfairly prejudice defendants. However, this Court has found that for certain offenses prior convictions are elements that must be proven to a jury beyond a reasonable doubt. See State v. Cozart, 177 W.Va. 400, 353 S.E.2d 152 (1986), State v. Hopkins, 192 W.Va. 483, 453 S.E.2d 317 (1994). Also, mandatory bifurcation is provided in such cases which avoids the matter of unfair prejudice. See State v. McCraine, 214 W.Va. 188, 588 S.E.2d 177 (2003).

In regard to the Appellee's discussion of State ex rel. Daye v. McBride, No. 33101 (W. Va., June 27, 2007), Daye dealt with whether § 60A-4-408 could override the mandatory application of § 61-11-18 rather than whether § 60A-4-408 itself was constitutional. In that particular case, Daye, the defendant, was indicted for a felony drug offense. Along with the underlying charged offense, Daye's indictment referenced § 60A-4-408 and also contained language regarding his prior drug conviction. Daye pleaded guilty to the indictment and expected to be sentenced pursuant to § 60A-4-408. However, prior to imposition of sentence the State filed a recidivist information under § 61-11-18 against Daye. As a consequence, Daye received a life with parole as his sentence.

In his appeal, Daye argued that he should have received the double sentence enhancement under § 60A-4-408 rather than the general recidivist life sentence. Therefore, Daye did not raise the issue of the constitutionality of § 60A-4-408. Likewise, the Court in Daye did not squarely address the constitutionality of § 60A-4-408. But it is clear that the Court treated both § 60A-4-408 & § 61-11-18 as recidivist statutes, one drug specific and the other general. This reaffirms the Court's reasoning as to the purposes and nature of § 60A-4-408 that was first stated in State v. Adkins, 168 W. Va. 330, 284 S.E.2d 619 (1981).

Although it went beyond the statutory language contained in § 60A-4-408A, the manner in which § 60A-4-408 was applied in Daye's case preserved his due process rights under the West

Virginia Constitution. The “second or subsequent offense” language of § 60A-4-408 was treated as an essential element of the charge against Daye. See Daye, supra, at fn. 1. The inclusion of § 60A-4-408 language in Daye’s indictment not only put Daye on notice that the State was seeking a drug recidivist sentence, but it also had the effect of making his prior drug conviction an element that needed to be proved to the jury.

Although Justice Clarence Thomas may be the only member of the U. S. Supreme Court firmly committed to expressly reversing the prior conviction exception, a majority of Justices - Thomas, Scalia, Steven, Souter, and Ginsberg - now rejects the prior conviction exception. See Almendarez-Torres, supra at 248–249 (SCALIA, J., joined by STEVENS, SOUTER, and GINSBURG, JJ., dissenting); Apprendi, supra at 520–521 (THOMAS, J., concurring); Shepard v. United States, 544 U. S. 13, 27–28 (2005) (THOMAS, J., concurring in part and concurring in judgment). Ironically, the primary case used to support the proposition in Almendarez-Torres that prior convictions are not elements of crimes was a case from West Virginia. However that case, Graham v. West Virginia, 224 U. S. 616 (1912), dealt primarily with whether West Virginia’s general recidivist statute violated Double Jeopardy. Further, Justice Scalia did not see any rational basis for a recidivism exception. Scalia also criticized the reliance of Almendarez-Torres, in support of a prior conviction exception, on Graham. As noted his Scalia’s dissent:

The *holding* of *Graham* provides no support for the Court’s position. It upheld against due process and double jeopardy objections a state recidivism law under which a defendant’s prior convictions were charged and tried in a separate proceeding after he was convicted of the underlying offense. As the Court notes, *ante*, at 243, the prior convictions were not charged in the same indictment as the underlying offense; but they *were* charged in an “information” before the defendant was tried for the prior convictions, and, more importantly, the law explicitly preserved his right to a jury determination on the recidivism question. \*\*\* The Court is certainly correct that the distinctive treatment of recidivism determinations for double jeopardy purposes takes some explaining; but it takes some explaining for the Court no less than for me. And the explanation assuredly is *not* (what the Court apparently suggests) that recidivism is never an element of the crime. It does much less violence to our jurisprudence, and to the traditional practice of requiring a jury

finding of recidivism beyond a reasonable doubt, to explain *Graham* as a recidivism exception to the normal double jeopardy rule that conviction of a lesser included offense bars later trial for the greater crime.

Almendarez-Torres, *supra* at 258-259 (emphasis in italics in original).

The rationale for the prior conviction exception runs counter to West Virginia law and jurisprudence. Considering the weak foundation for the prior conviction exception, this Court should not be beholden to Apprendi. Rather than adopt this exception and deal with analyzing whether its scope is broad or narrow--whether this exception applies beyond the mere fact of conviction and can apply to nature of offenses or even juvenile adjudications--this Court should, as a matter of state constitutional law, reject the prior conviction exception as boldly as it made bifurcated trials mandatory in McCraine<sup>1</sup>.

C. Evidentiary Standard

There are two problems with the evidence considered by the trial court at the Appellant's sentencing. First, §60A-4-408 does not specify that a prior drug conviction must be proven beyond a reasonable doubt. Second, the evidence the trial court considered at sentencing may not be admissible for consideration by a jury due to a lack of foundation or authentication.

§60A-4-408 does not mandate the type of evidence or level of proof required to establish the fact of a prior conviction. Thus, the trial court could have concluded by a mere preponderance of the evidence that the Appellant had a prior drug conviction without offending the provisions of §60A-4-408. Conceivably, a trial court could enhance a sentence under 60A-4-408 solely on that court's personal knowledge that a defendant has an out of state misdemeanor drug conviction.

The record does not establish that the evidence considered at sentencing would have been admissible for consideration by the Appellant's jury. The trial court reviewed a court file containing information regarding an earlier criminal case involving the Appellant. Based upon the

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<sup>1</sup> When this Court adopted mandatory bifurcation for trials of repeat criminal offenses, it acknowledged that no other jurisdiction provided for mandatory bifurcation. See McCraine, *supra*.

statements of the trial court, the court file contained information regarding an earlier felony drug prosecution of the Appellant. However, the trial court did not rule on whether any of the contents of the file were self-authenticating documents under WVRE 902, and there was no testimony by persons responsible for maintaining the court file to establish that the contents were kept as a public record. Of course, the fact of a prior conviction was determined by the trial court at sentencing, not by a jury during the trial. Since the recidivism proceeding was conducted as a typical sentencing hearing, the Rules of Evidence did not apply pursuant to WVRE 1101(b). Though the trial court actions were proper under 60A-4-408 and conformed with the Rule of Evidence pertaining to sentencing hearings, it denied the Appellant a full recidivist hearing. Instead, the Appellant received a mere sentencing hearing lacking the full due process guarantees under the West Virginia Constitution.

The Appellee argues in its brief that the Appellant cannot contest the validity of the evidence used to establish the prior drug conviction. Implicit in this assertion is that the evidence of a prior drug conviction was so strong that the outcome would have been the same even after a full recidivist hearing. However, it cannot be argued procedural due process does not matter because the end result may have been the same. The fact the Appellant is guilty of the underlying offense did not do away with his right to a trial by jury and proof beyond a reasonable doubt. The existence of a prior drug conviction should not deprive the Appellant of the panoply of rights provided in a full recidivist hearing.

### III.

#### CONCLUSION

Viewed under the light of the due process guarantees of West Virginia Constitution, the Apprendi/Almendarez-Torres prior conviction exception is an emperor without clothes. For the reasons stated in the this reply brief and earlier Appellant's brief, the West Virginia Constitution

does not permit the Appellant's sentence to be increased twofold on a basis of a prior conviction that was not charged, tried before a jury, and found beyond a reasonable doubt. The prior conviction exception should be clothed under the blanket rule that all facts that increase a defendant's sentence beyond the statutory maximum must be tried to a jury and proven beyond a reasonable doubt.

Respectfully submitted,

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# CERTIFICATE OF SERVICE

I, Mark P. Chaksupa, hereby certify that a true and exact copy of the foregoing REPLY BRIEF OF THE APPELLANT was served on the following persons when true and exact copy thereof were deposited in the U.S. Mail, First Class Postage Pre-paid, on this 18<sup>th</sup> day of September, 2008, addressed to:

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